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Supreme Court, U.S.
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No. 1

In the Supreme Court of the United States

DEBORAH A. PURNELL,

Petitioner,

vs.

CEDARS-SINAI MEDICAL CENTER;
FRANCES S. LINEBACK, M.D.

Respondents.

On Petition for a Writ of Certiorari To the Court of Appeal of the State of California For the Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court violated Constitutionally protected rights to due process and jury trial when it disposed of an entire action against a party with a surprise "speaking" motion to dismiss, without the dismissed party having to file one written document to support the dismissal.

2. Whether the court violated Constitutionally protected rights to life, liberty and personal property when it concluded that the prescription, recommendation and/or performance of an unnecessary major surgery is not *inherently* an act of negligence which falls below the standard of care in the medical community.

3. Whether the Court erred in requiring a conclusion of law (i.e., whether the medical care was above or below the standard of care) from an expert witness who described a negligent medical act in plain and common language that a jury could understand.

4. Whether a patient has a right to know, by name and title, any student or substitute medical doctor who is *scheduled* to participate as a surgeon in a non-emergency, pre-planned surgery that the patient arranged with a private specialist

surgeon; and whether it violates a patient's Constitutional rights to life and liberty to use student or substitute medical doctors that have not been specifically identified by name and title to the patient *in advance* of the procedure.

5. Whether the court erred in concluding that when a hospital places a disclaimer on the surgical pre-admission forms that states that it is a teaching hospital that ***may*** bring in student doctors to treat you constitutes full disclosure that the hospital has *planned* and *scheduled* student doctors to operate on your body during a pre-planned, non-emergency surgery.

6. Whether the Court erred when it refused to consider any of the material evidence in dispute on a motion for summary judgment matter that was not in the form of "expert testimony."

PARTIES TO THE PROCEEDINGS

Pursuant to Rules 14.1(b) and 29.6, the following identifies all of the parties appearing here and before the Court of Appeals of the State of California and their corporate status.

Petitioner and Appellant

Deborah A. Purnell, an individual

Respondents and Appellees

Cedars-Sinai Medical Center, a California corporation
Frances S. Lineback, M.D., an individual

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In the
Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeal of California

Petitioner, Deborah A. Purnell, respectfully petitions that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the Court of Appeal of California is set forth in Appendix A. The opinion is Not Reported in Cal.Rptr.3d, 2007 WL 2938438 (Cal.App.2 Dist. 2007).

JURISDICTION

The Court of Appeal of California issued its opinion on October 10, 2007. See Appendix A. The petition for rehearing was timely filed and the Court of Appeal entered its order denying rehearing and rehearing en banc on November 5, 2007. See Appendix B. A petition for review was timely filed with the Supreme Court of California and the Supreme Court entered its

order denying review on January 3, 2008. See Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves provisions which protect a patient's right to litigate against any and all medical providers that cause undue harm and injury; a patient's right to protest the prescription, recommendation and/or performance of an unnecessary surgery for the removal of body parts that do not need to be removed; a patient's right to all pertinent information concerning his or her medical care; and a patient's right to know whether a Court can lawfully determine that the wants and needs of certain medical providers (which in this case included a hospital's need to teach its students on live human bodies) can negate a patient's Constitutionally-secured rights to life, liberty, due process protections under the law, and jury trial.

Petitioner is not challenging the constitutionality of any laws but rather seeking relief from the Court's refusal to apply Constitutional protections to this Petitioner, as well as the Court's propensity to consider the evidence in a light most *unfavorable* to the Petitioner.

The Seventh Amendment to the Constitution of the United States provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Medical Practice Act, Bus. & Prof. Code §§2001.1-2266, which is set out in pertinent part in Appendix D.

STATEMENT OF THE CASE

This case involves several issues of national importance concerning a patient's right to litigate against any medical provider who is believed to have provided negligent medical care, the protection of our informed consent rights, and a patient's right to have the least invasive treatments prescribed and performed on our bodies.

Petitioner, Deborah A. Purnell, brought a medical malpractice action against Cedars-Sinai Medical Center in Los Angeles, Cedars' former Chief of Staff, then-current Peer Review Board Member and Ob-Gyn Specialist, Arthur I. Johnson, M.D., and Cedars' staff medical doctor, Frances S. Lineback, M.D., for the negligent diagnosis, recommendation and/or performance of a hysterectomy surgery which resulted in life-threatening injuries that required corrective surgeries, additional body part removal, and caused undue pain and suffering.

The Court of Appeal affirmed the granting of summary judgment for Cedars on the grounds that Petitioner's expert witness, Ob-Gyn Specialist, Dr. Simon Henderson, did not state that the subject hysterectomy was below the standard of care, even though his declaration did state in pertinent part, in clear and common language, that he:

> "would have disagreed with Dr. William Young and Dr. Arthur

> Johnson's opinion that a hysterectomy was necessary at that time;" "would not have recommended the surgery;" "a hysterectomy should not have been recommended;" "surgery could increase Ms. Purnell's chances of suffering from adhesions which would complicate any surgical procedure in that area. Therefore, in my opinion, a hysterectomy should not have been recommended;" "Deborah Purnell should not have been advised to have a hysterectomy because her irregular bleeding had only occurred for approximately 3-5 months prior to the hysterectomy and there was no cancer found in her pre-operative or post-operative tests. I would have agreed . . . not to have a hysterectomy;" "and I found no evidence in the medical records that Dr. Johnson had informed Deborah Purnell of potential risks and complications before undergoing a hysterectomy. (Appellant's Opening Brief ("AOB"), Ex. C).

The Court refused to consider any of the non-expert, direct, eye-witness testimony that Petitioner presented nor would the Court consider the content, message or intent of Petitioner's expert declaration. The Court only

mentioned and considered the parties' expert testimony and ignored the remainder of the material evidence which also disputed Cedars' expert witness declaration on key issues of law and fact.

The Court's refusal to consider all the evidence presented on summary judgment is hereby being challenged as a violation of Petitioner's right to due process protections under the law.

On appeal, Petitioner argued that *Code Civ. Proc.* §437c clearly stated that the affidavits must give rise to a triable issue of fact, not merely claim that an act meets the standard of care or is below the standard of care. In making this determination, the moving party's affidavits are strictly construed while those of the opposing party are liberally construed. *DiLoreto v. Board of Education* (1999, 2d Dist.) 74 Cal.App.4th 267, 274, 87 Cal.Rptr.2d 791; *Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 42 Cal.Rptr. 449.

Axiomatic in the granting of a summary judgment is the rule that the counter-affidavits or depositions of the opposing party are sufficient if they disclose evidence supporting a *possible* cause of action; they need not, at this stage, prove anything. The purpose of a summary judgment procedure is not to try the issues but merely to determine whether there are issues to be tried, and, contrary to the rule governing the moving party's affidavit, the

counter-affidavit is liberally construed. *Orser v. George* (1967 3d Dist.) 252 Cal.App.2d 660, 60 Cal.Rptr. 708. The Court of Appeal refused rehearing.

Nevertheless, the Court of Appeal affirmed the complete dismissal of Cedars.

Immediately after the court granted summary judgment for Cedars, without notice or warning, the court granted a "surprise *speaking* motion to dismiss all causes of action against Dr. Lineback as well, even though Dr. Lineback was not a party to Cedars' motion for summary judgment, nor did she have any motions pending on her own behalf.

Action Against Dr. Lineback

For close to an entire year into the litigation of this action, and at all times prior thereto, Cedars and Dr. Johnson, individually and collectively, falsely claimed that Cedars had no staff doctor(s) participating in the subject surgery along with Dr. Johnson, in an unconscionable and dishonest attempt to shield Cedars from any and all accountability for the events surrounding the subject surgery.

Eventually, the truth came to light and Petitioner discovered that Cedars had an intern staff medical doctor, Frances S. Lineback, M.D., perform Petitioner's hysterectomy along with Dr. Johnson.

After Petitioner deposed Dr. Lineback for her possible role in tampering with medical records (several of which were in dispute), and Dr. Lineback's surgical participation was made known to Petitioner, Petitioner sued Dr. Lineback as an individual defendant, formerly known as Doe 1.

By the time Cedars' motion for summary judgment was being heard, Dr. Lineback lacked the required time to file a motion for summary judgment on her own behalf prior to the trial date. Therefore, as a direct result of Cedars and Dr. Johnsons' own trickery and deceit in denying the hands-on participation of a staff medical doctor(s) who performed the subject surgery along with Dr. Johnson, Dr. Lineback did not have ample time to bring a motion for summary judgment on her own behalf.

Notwithstanding the foregoing, and in blatant disobedience to Petitioner's Seventh Amendment and Fourteenth Amendment rights to a jury trial and due process protections under the law, the lower court granted, and Court of Appeal affirmed, a verbal request to dismiss the entire action against Dr. Lineback with no supportive paperwork, notice, summary or written arguments whatsoever.

In order to effectuate this decision, the Courts had to reinstate the usage of "surprise speaking motions to dismiss" back into our court systems, which have not been a part of California law for over 50 years.

On appeal, Petitioner repeatedly argued that so-called "speaking motions to dismiss" which were recognized by our courts in some instances prior to 1959, are no longer a part of California practice. *State Market of Avenal, Inc. v. Superior Court of Kings County* (1959, 4th Dist) 172 Cal.App.2d 517; *Pianka v. State* (1956) 46 Cal.2d 208, 293 P2d 458; and that speaking motions have been superseded by the procedure governing motions for summary judgment as set forth in CCP Section 437c. *Howlett v. Transit Casualty Co.* (1969, 2d Dist) 271 CalApp.2d 348.

While the Court of Appeal acknowledged that such a dismissal *could* constitute reversible error (App. A-24 to A-25), it also concluded, in essence, that this Petitioner's rights to Seventh and Fourteenth Amendment protections under the U.S. Constitution, which our United States government *imposes* on judicial matters, could lawfully be revoked because:

> There was no prejudicial error in granting summary judgment as to respondent Lineback. (App. A-2);
>
> * * *
>
> [n]o judgment should be reversed due to error unless it appears ***from the record*** that the error was prejudicial and a different result would have been likely if the error had not occurred. (App. A-25)

> Here, it is readily apparent a different outcome would not have resulted even if Dr. Lineback had filed her own separate motion for summary judgment. (App. A-25).

The Court's own reference to "the record" is the same premise upon which the dismissal against Dr. Lineback should *never* have been granted. There was no record, summary, notice or separate statement for the court to consider and/or review, forcing all of the after-the-fact conclusions in the Court's opinion to be based on speculation and conjecture regarding events, a motion, a summary or separate statement that never existed.

In fact, the only record on file on behalf of Dr. Lineback was a "form" Answer which denied all of the causes of action in the Complaint. Dr. Lineback did not demurrer or motion to strike one single cause of action, leaving the Court with no documentation to base a dismissal on other than its own personal opinions, prejudices and biases, which is not the proper role of any review court.

Code of Civil Procedure §437c, ¶24, clearly states in pertinent part:

> A moving defendant in summary judgment proceedings may not shift the burden to plaintiff to put on a *prima facie* case simply by suggesting the possibility that the plaintiff cannot prove its case. It is

> clear that from the requirement of the 1992 amendment to CCP Section 437c, former subd. (n)(2), that a defendant must make an affirmative showing in support of his or her motion. Such a showing connotes something significantly more than simply pointing out to the court that there is an absence of evidence. *Hagen v. Hickenbottom* (1995, 6th Dist), 41 Cal.App.4th 168.

The Court of Appeal conjured numerous after-the-fact reasons why such a dismissal was just, proper and should be affirmed. But the truth remains, that none of these reasons were before the lower court, nor this Petitioner, for consideration and/or rebuttal. After-the-fact reasoning is not supported by our Constitutional protections.

In this country, at this time, we do not lynch people first and then explain the reasons why we lynched them after the body is dead and buried. That is why our government is a government of laws that *secures* certain rights of jury trial and due process protections under the law, as defined under the Seventh and Fourteenth Amendments of the U.S. Constitution, both of which were violated by the Courts herein.

Therefore, the Court of Appeal's arguments should not be considered due to this country's protection of each individual's

Constitutional rights to prosecute those who have harmed us and our right to receive *equal* protection under these laws.

Dr. Lineback was sued as a separate defendant, with duties and obligations under state and federal laws that may differ from the duties that Cedars may or may not have required, and this Petitioner exercised her Constitutional right to hold this medical doctor accountable, separate and apart from the hospital, for her actions surrounding the surgery she performed on Petitioner's body.

The Court of Appeal concluded that if the case against Dr. Lineback were remanded to trial, such an act would constitute re-litigating the matter. The Court stated:

> Appellant is collaterally esteemed from re-litigation of this issue, and Dr. Lineback would prevail as a matter of law on any claim for medical malpractice relating to the hysterectomy." (App. A-28).

The Court erred in concluding that the action against Dr. Lineback was ever litigated, as there were no documents on file to support this contention. The form Answer that Dr. Lineback filed was far from the complete litigation of a matter, particularly when Dr. Lineback failed and/or refused to challenge one single cause of action. On appeal, Petitioner argued the impossibility of re-litigating a matter that was never litigated. There was no summary,

no issues, no notice and no separate statement before the court to review on behalf of Dr. Lineback which made the dismissal thereof inherently prejudicial and unjust.

The Court acknowledged that Dr. Lineback was not a party to the lawsuit at the time that Cedars filed its motion for summary judgment papers (App. A-25 to A-27), yet found no harm in violating Petitioner's Seventh and Fourteenth Amendment protections under the law which force Dr. Lineback to abide by due process mandates which require that she *defend herself* against charges brought against her and timely file the appropriate dismissal documents when seeking a dismissal.

Petitioner further challenged the Court's conclusion that Petitioner would not have been able to obtain a jury verdict, and referenced *Jines v. Abarbanel,* 77 Cal.App.3d 702; 143 Cal.Rptr. 818, wherein the court found that after a trial by jury, damages were awarded to said plaintiff who, as a result of a hysterectomy performed by defendants, was forced to spend an additional 180 days in the hospital and undergo 8 operations to cure abscesses resulting from the original surgery.

In this case, to date, Petitioner spent an additional 38 days in the hospital and underwent 2 additional major surgeries to try to cure the life-threatening damage and injury caused from the original surgery (which included damaged bowels, damaged intestines that were laying on the bottom of Petitioner's abdomen

leaking bile, and the inner abdominal wall was left unclosed while the outer abdominal wall was closed) which complications left Petitioner in a terminal medical condition if she did receive a successful corrective surgery(ies).

Days after the hysterectomy, Petitioner was forced to undergo an additional major surgery which included the removal of over 12 inches of damaged intestines and extensive internal repair work to sustain life. A few months later, another major surgery was required for the removal and/or rerouting of additional damaged intestines, 75 days of leaking bile through the surgical wounds, draining of a grapefruit size cyst in the operative area, with at least one additional major surgery pending to try to relieve the ongoing pain and discomfort.

In the *Jines* case, the court also identified the negligence in prescribing an unnecessary hysterectomy, and the fact that additional surgeries were needed to correct the damage and injury that occurred during the subject surgery, was pivotal to the jury's finding in plaintiff's favor. In that same manner, a jury would have found for Petitioner as against Dr. Lineback and Cedars.

The Court's failure to force a party to present a *written* defense deprived this Petitioner of any and all opportunity to challenge a motion which carries the power to dispose of the entire lawsuit against a party, which inherently denied this Petitioner of any form of

legal redress for her injuries, or constitutional protections secured by law.

The Court misstated Dr. Lineback's role as "assisting primarily in holding and suturing" (App. A-21), yet admitted that Dr. Lineback "stated she *probably* did perform a portion of the hysterectomy." (App. A-3).

During Dr. Lineback's deposition, she testified that she was a medical doctor who: (i) reviewed Petitioner's medical records in advance of the subject surgery; (ii) performed some of the hysterectomy as she cut on one side of Petitioner's body while Dr. Johnson cut on the other side of Petitioner's body, as she and Dr. Johnson had problems visualizing their landmarks; (iii) followed up with Petitioner's medical care by making post-operative "rounds" daily for 11 to 12 days after the subject surgery; and (iv) reported the difficulty of the subject surgery to her supervisors.

The court's dismissal of the action against Dr. Frances Lineback was therefore in error and unconstitutional.

Action Against Cedars

Petitioner's case against Cedars initially arose out of claims that Cedars should not have allowed and/or enabled its former Chief of Staff and then active Peer Review Board Member, Dr. Arthur I. Johnson, to diagnose and practice surgeries on its premises while he was suffering

from a seriously debilitating central nervous system disease that caused diminished mental and motor skills, and resulted in a misdiagnosed and negligently performed hysterectomy. Three months after Petitioner's hysterectomy, Dr. Johnson resigned his 30+ year tenure at Cedars, even though he continued to sit on several of Cedars' boards. Four month after Dr. Johnson's staff resignation at Cedars, Dr. Johnson closed his office at Cedars and confessed his illness in a letter addressed to all of his patients wherein he stated in pertinent part:

> "I am closing my practice . . . because I have been afflicted with an illness. The illness is called Primary Progressive Aphasia [aka Parkinson's disease] . . . it is a central nervous system disorder causing my motor skills to be slower . . . I have already ceased doing surgery and deliveries . . . especially if you need my full capabilities (surgery and delivery). So, I decided regretfully, to take an early retirement." AOB at Ex. C.

Dr. Johnson's mental and physical abilities came into question because of the disastrous outcome of the subject surgery.

On April 7, 2005, Cedars filed a motion for summary judgment, on its own corporate behalf, against Petitioner.

When Cedars filed its *Reply* to Petitioner's Opposition to Cedars' Motion for Summary Judgment. Cedars added Dr. Lineback's name to the *cover page* of the Reply. Dr. Lineback and Cedars shared the same attorneys of LaFollette, Johnson, DeHaas, Fesler & Ames in Los Angeles, which enabled them to attempt to undermine the due process of timely noticing and filing a motion for summary judgment and separate statement on behalf of Dr. Lineback by adding her name to the Reply cover page.

While the Court of Appeal acknowledged on the one hand that Dr. Lineback was not a party to Cedars' motion for summary judgment (App. A-6; A-17), it concluded that it was just and proper that Dr. Lineback "*joined* a co-defendant pending motion" (A-16) and *became* a party to Cedars motion for summary judgment at the **Reply** stage of a motion for summary judgment.

On appeal, Petitioner argued the impossibility of adding a party to the *reply* stage of any motion without violating due process protections under the law for its inherent prevention of affording the opposing party any opportunity to oppose and defeat the motion. The Court of Appeal refused to rehear the matter on this or any other grounds.

The court granted Cedars' summary judgment motion on the grounds that Petitioner's expert did not opine on the standard

of care, even though said expert described, in plain and common language that a jury could understand, that the hysterectomy surgery was not necessary due to Petitioner's mild symptoms and lack of cancer.

Dr. Henderson's declaration stated in pertinent part:

> 5. . . . **I would not have advised Deborah Purnell to undergo a hysterectomy** in May 2003. **I would have disagreed with Dr. William Young and Dr. Arthur Johnson's opinion that a hysterectomy was necessary** at that time.
>
> 6. . . . I would have advised that Deborah Purnell proceed with her already scheduled, less invasive, non-surgical Uterine Artery Embolization procedure or a trial of appropriate medication in lieu of the hysterectomy that was prescribed by Dr. William Young and Dr. Arthur Johnson.
>
> 7. The fact that Deborah Purnell had two etopic pregnancies approximately 18 years prior to the May 2003 **surgery could increase Ms. Purnell's chances of suffering from adhesions which would complicate any surgical procedure in that area**. Therefore, in my opinion, a **hysterectomy should not have been recommended** in May 2003 before other less invasive treatments, including but not

limited to, the Uterine Artery Embolization procedure, was undergone.

8. It is also my opinion and belief that Deborah Purnell **should not have been advised to have a hysterectomy because irregular bleeding had only occurred for approximately 3-5 months prior to the hysterectomy and there was no cancer found in her pre-operative or post-operative tests.** I would have agreed with Dr. Gail Jackson's advice **not to have a hysterectomy.**

9. I found **no evidence** in the medical records that I reviewed that Dr. Johnson **had informed Deborah Purnell of potential risks and complications before undergoing a hysterectomy.**

[Emphasis added; Appellant's Opening Brief ("AOB"), Exh. C]

The Court Appeal affirmed the complete dismissal of all of the evidence based on Petitioner's lack of a conclusion of law regarding the standard of care.

However, the law provides for situations where a layperson, without expert testimony, may infer as a matter of common knowledge that the injury would not have occurred unless someone were negligent.

Petitioner argued that Dr. Henderson's conclusion that the surgery "should not have been recommended," and other such reasons as set forth above, were written in plain and common terms that a jury could understand.

While the Court acknowledged that testimony can be in "common language," (App. A-12 to A-13) the Court refused to categorize "an unnecessary and dangerous surgery due to mild symptoms and no cancer" as common and simple for a jury to understand. Such refusal to examine the evidence is in the light most favored to Petitioner is in dispute herein as it violated Petitioner's due process protections under the law.

The courts have established "common knowledge" exceptions to expert testimony in evaluating events, even medical events, that are within the common knowledge of most layperson's experiences.

> In medical malpractice cases, in which the physician or surgeon has injected a substance into a patient's body, the jury may properly rely on its common knowledge, in determining whether the accident is of a kind that ordinarily would not have occurred in the absence of someone's negligence, if the routine medical procedure is relatively commonplace and simple, rather than special, unusual, and complex.

Bardessono v. Michels (1970) 3 Cal.3d 780, 91 Cal.Rptr. 760, 478 P.2d 480.

> Since the doctrine permits the jury to infer negligence from the happening of the accident alone, there must be a basis either in **common experience** or expert testimony that when such an accident occurs, it is more probably than not the result of negligence.

Tomei v. Henning (1967) 67 Cal.2d 319, 62 Cal.Rptr. 9, 431 P.2d 633; *Hale v. Venuto* (1982, 4th Dist.) 137 Cal.App.3d 910 187 Cal.Rptr. 3576).

Furthermore, Petitioner's expert, Dr. Simon Henderson, not only opined that the hysterectomy surgery [which consisted of the removal of female reproductive organs] was "not necessary," but also opined that any surgery in that area had an increased chance of complications due to Petitioner's history of two etopic pregnancies, which was another important reason why a hysterectomy should not have been performed on Petitioner at that time.

While Dr. Henderson also testified that there were no informed consent forms in the medical records. Cedars' expert, Dr. Amy Roseanne, testified that Cedars was not obligated to inform Petitioner of anything [including the fact that Cedars and Dr. Johnson

had arranged to have a first year intern, Dr. Lineback, cut on Petitioner's body along with Dr. Johnson for this pre-planned, non-emergency surgery on this extremely well-insured patient].

The Court acknowledged that the Health & Safety Codes require certain disclosures before a patient is to have a hysterectomy performed but then stated that the performing surgeons can transfer that duty and obligation to a different hospital facility and/or medical provider who is not working with the surgeons who are to care for the patient. That is not what the Code states:

> Health & Safety Code §1690(a) **requires**:
>
> > Physicians and surgeons, prior to the performance of a hysterectomy, to advise the patient that she may withhold or withdraw her consent at any time prior to the procedure, to describe to a type of surgery involved and the known alternatives to this surgery, to advise the patient that the hysterectomy is irreversible and that infertility will result, to describe the risks and the possible benefits of the procedure, and to explain the financial costs, the length of the hospital stay, and the length of the recovery time. The failure of a physician or surgeon to inform a patient of alternative

methods of treatment before performing a hysterectomy constitutes unprofessional conduct.

* * *

A physician's duty to inform a patient of the consequences of a particular treatment or procedure does not necessarily terminate when the patient decides to undergo the treatment or procedure. For example, in an action for damages allegedly sustained by a patient from a Dalkon Shield intrauterine device inserted by a physician, the could be held liable even if the physician had not been negligent in initially inserting the device. By alleging that the physician breached his duty to warn the patient of the dangerous effects of the dangerous effects of the device when, subsequent to its insertion, the physician obtained actual knowledge of its hazards, the complaint stated a cause of action for malpractice based on the continuing physician-patient relationship.

Tresemer v. Barke (11978, 2nd Dist.) 86 Cal.App.3d 656, 150 Cal.Rptr. 384]

While the Court acknowledged that Cedars' expert witness admitted that Cedars had no obligation to inform Petitioner of anything, the Court then misstated the record by claiming that a doctor from a different doctor other than Cedars (Dr. Bruce McLucas at UCLA) fulfilled **Cedars'** duties and obligations under the law to inform Petitioner of the dangers of the hysterectomy, which was simply untrue.

Petitioner only met with Dr. McLucas once. Dr. McLucas was not working with Cedars concerning Petitioner's medical care and could not absolve Cedars, who was planning on performing major surgery on Petitioner, from any of its disclosure duties and obligations under the law. These two facilities were competing for Petitioner's business, not working together.

If the Court of Appeal's position were correct, a medical facility could claim that some television program fulfilled a surgeon's duties under the law as well. Such responsibilities of disclosure must stay with the specific medical doctors and facilities who are treating a patient because the details of everyone's treatment varies – and so should the warnings. Such informed consent obligations are not transferable, Cedars was negligent in not informing Petitioner of the risks of a hysterectomy, and the Court of Appeal was wrong to imply that Cedars could avoid these legally imposed duties in that manner.

When Petitioner left Dr. McLucas' office, she had already agreed to arrange for the Uterine Artery Embolization procedure but she had to get anesthesia approval before the procedure (due to asthma). It was only while Petitioner was her private physician's office, Dr. William Young, did he introduce Petitioner to Dr. Johnson (via telephone) to seek advice for a hysterectomy. On Petitioner's one personal visit with Dr. Johnson prior to the subject surgery, Dr. Johnson discredited Dr. McLucas (who formerly worked at Cedars) and further discredited the UAE procedure and claimed that Cedars would not allow Dr. McLucas to perform that new and dangerous procedure on its premises. The medical records reflect the proper series of events and that it was only after meeting with Dr. Johnson did Petitioner cancel her scheduled UAE procedure and opt for a hysterectomy, which Dr. Johnson said had been around for a very long time, he had performed over 1,000 of them, they were easy for him to perform, and had the shortest recovery time.

Furthermore, the undisputed fact remains that a hysterectomy [unbeknownst to Petitioner at that time], was not only an option (as if the unnecessary removal of body parts could ever be properly trivialized in that manner), but the surgery was exceptionally dangerous to Petitioner due to her 18 year old history of two ectopic pregnancies, so there should have been no reason that Cedars allowed this surgery on its premises. Dr. Johnson was suffering from mental illness when he prescribed the

hysterectomy but Dr. Lineback was supposedly of sound mind, which means she, and/or he supervisors, should have stopped it.

The Court of Appeal's opinion constantly implies that Cedars had no control over the use of its staff and medical facilities when a private doctor wants to utilize them but the truth is that hospitals are held accountable for the quality of medical care that its staff provides.

Historically, the hospital is responsible for the actions of its employees, as supported by *Elam v. College Park Hospital*, 132 Cal.App.3d 332; 183 Cal.Rptr. 156.

Cedars is undoubtedly liable for the actions of its employees. *Elam* applies, but the California Civil Practice §32:25 outlines the vicarious liability for acts of other in specific detail as follows:

> Under the doctrine of *respondeat superior,* a principal may be held liable for the torts of its agents or employees, even though the principal is itself innocent of tortious conduct. Liability is imposed when the agent's or employee's tortious conduct occurs while the agent or employee is acting within the scope of employment.

When Dr. Johnson solicited the services of Cedars and its staff doctor, there became a two-fold relationship wherein both employers are responsible for the outcome of the patient's care.

The California courts have ruled:

> The special employment relationship and its consequent imposition of liability upon the special employer flows from the borrower's power to supervise the details of the employee's work. Mere instruction by the borrower on the result to be achieved will not suffice. Moreover, California courts have held that evidence of the following circumstances tends to negate the existence of a special employment: The employee is (1) not paid by and cannot be discharged by the borrower, (2) a skilled worker with substantial control over operational details, (3) not engaged in the borrower's usual business, (4) employed for only a brief period of time, and (5) using tools and equipment furnished by the lending employer. Additionally, where the servants of two employers are jointly engaged in a project of mutual interest, each employee ordinarily remains the servant of his own master and does

> not thereby become the special employee of the other.

Truhitte v. French Hospital, 128 Cal.App.3d 332; Cal.Rptr. 152.

In *Truhitte*, the Appellate Court concluded that the co-defendant hospital would also be held liable for the nurse who was assisted the primary physician during surgery. The hospital argued the transference of all accountability from the nurse to the treating physician (on the exact grounds as this Court is arguing the complete transference of all accountability of Dr. Lineback to Dr. Johnson); but the Appellate Court ruled that there were two employers who could be held liable – the doctor and the hospital.

In *Quintal v. Laurel Grove Hospital*, 62 Cal.2d 154; 397 P.2d 161, the Appellate Court ruled that:

> The trial court erred in failing to instruct the jury on the doctrine of res ipsa loquitur because (1) there was evidence that, even though rare, a cardiac arrest could occur; (2) both doctors had access to the records, testified that fever and apprehension could cause a negative reaction, and could have called off the c eration; . . . (4) the evidence supported an inference that the doctors did not act with reasonable care." (Emphasis added)

Quintal was another case wherein the Appellate Court forced both doctors to be held accountable for their actions, and in *Quintal,* that Court also addressed the fundamental issue that "the appellate court must read the record in the light most advantageous to the plaintiff, resolve all conflicts in his favor, and give him the benefit of all reasonable inferences in support of the judgment."

The ability to "call off the operation" is crucial in this case because the prescribed surgery was *unnecessary* and *harmful.*

> In appropriate case, testimony by medical experts regarding what, if any, disclosures in addition to those relating to the risk of death or serious injury and significant potential complications posed by consenting to or declining proposed treatment should be made to the patient by a skilled practitioner in the relevant medical community under the circumstances, is relevant and admissible. However, the role of such expert testimony in informed consent litigation is limited and essentially subsidiary.

Arato v. Avedon (1993) 5 Cal.4th 1172, 23 Cal.Rptr.2d 131, 858 P.2d 598]

The Court's Refusal to Consider Non-expert Testimony Was Contrary to Law

One of Cedars' finest surgeons, Dr. Kenneth Adashek performed the corrective surgeries. Dr. Adashek provided direct eye-witness testimony that the bowel was damaged, the intestines were damaged, and the inner abdominal wall was left unclosed.

He testified that the life-threatening damage and injury he operated on was undoubtedly caused *during* the subject surgery. He testified that Petitioner would not have survived without corrective surgery.

Ironically, Cedars' expert testified that Dr. Johnson did not cut anywhere near the damaged area, which also incriminated Dr. Lineback, who testified that she "cut on one side of Petitioner's body while Dr. Johnson cut on the other side as she "performed the hysterectomy" on one side that was hard for Dr. Johnson to reach.

In sum, because Dr. Adashek testified that the life-threatening injury he operated on was caused during the subject surgery, and Dr. Rosemann testified that Dr. Johnson cut no where near the subject surgery, Dr. Rosemann's inadvertently incriminated Dr. Lineback as the party to impose the life-threatening injuries to Petitioner's body. This material evidence alone constitutes triable material evidence in dispute to merit trial.

Furthermore, Dr. Rosemann testified, and the Court of Appeal repeated as if it was an undisputed fact, that Petitioner only suffered from a "minor bowel obstruction." In light of Dr. Adashek's testimony that the injury was *not* a minor bowel obstruction and that people live with minor bowel obstructions all the time but what he performed surgery on was life threatening damage and injury that could not have possibly existed when Petitioner arrived at Cedars, the Court's recital of Dr. Rosemann's opinion constituted an unlawful weighing of the evidence in the light most unfavorable to Petitioner. Dr. Adashek's testimony was direct, eye-witness testimony from the surgeon who performed the corrective surgeries, not an expert witness who reviewed medical records; yet the Court completely refused to consider his testimony, which was a violation of Petitioner's rights and protections of due process under the law.

Dr. Adashek further testified that no patient could walk into a hospital with the type of injury that he had to correct, and that he had no knowledge of a second surgeon (Dr. Lineback) and thought that Dr. Johnson was the only surgeon involved.

The Court of Appeal therefore ignored the gross contradictions at the core of Cedars' expert's testimony (i.e., whether or not the surgery was necessary, irregular menses for 1 year or 3 months, whether the complication

was a minor bowel obstruction and whether Petitioner arrived at Cedars with the damage and injury she needed additional surgeries to correct and whether Cedars had an obligation by law to inform Petitioner of anything concerning a hysterectomy). By ignoring the conflicting nature and intent of this triable material evidence, the Court deprived this Petitioner of her Seventh Amendment rights and protections to proceed to trial and Fourteenth Amendment rights to due process under the law.

The Court's refusal to consider any of the evidence other than expert was not in conformity with the existing laws:

Evidence Code §410 states:

> "Direct Evidence": means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes a fact. **Leg.H.** 1965 ch. 299, operative January 1, 1967.

Therefore, as prescribed by Evidence Code §410, Petitioner's use of direct testimony and evidence must be given more weight and should be viewed as an establishment of fact, as opposed to the opinion of a paid expert.

Evidence Code Chapter 5, §411 states:

> Except where additional evidence is required by statute, the direct evidence of **one witness** who is

> entitled to full credit is sufficient for proof of any fact. **Leg.H.** 1965 ch. 299, operative
>
> A Plaintiff is not required to produce or to file an expert declaration for experts who have not been retained for the purpose of forming and expressing an opinion as prescribed by CCP §2034(a)(2). Therefore, a Plaintiff may designate his or her treating physicians as experts without having to disclose them as experts.

Hurtado v. Western Medical Center (1990, 4th Dist.) 222 Cal.App.3d 1198, 272 Cal.Rptr. 324.

The entire court record, which the trial court refused to consider, evidenced material evidence in dispute which should have been forwarded to a jury trial for determination.

Dr. Adashek's testimony completely contradicted Cedars' expert witness, Amy Rosemann's, testimony which declared that Petitioner must have already had the complications that Dr. Adashek had to correct when Petitioner arrived at Cedars, and that Petitioner only suffered a minor bowel obstruction. Dr. Rosemann also based her testimony that the subject hysterectomy was necessary on a spoiled medical record which was in direct contradiction to other medical records from the same (Dr. Johnson) and different (Dr. Gail Jackson) doctors' office. The spoiled

record which Dr. Rosemann, and the Court of Appeal, relied on stated that Petitioner suffered with irregular bleeding for over a year instead of 3 to 5 months. There were three medical records that said Petitioner only suffered for 3 months and one medical record that claimed irregular menstruals for 1 year and 3 months and all of the records were written within weeks of one another and supposedly describing the exact same thing (i.e., how long Petitioner was suffering with irregular menstrual bleeding).

Dr. Adashek, whose testimony is from an eye-witness standpoint testified that the damage that he operated on was caused during the subject surgery, so the cuts that caused the damage must have come from Cedars' staff intern, Dr. Lineback, who testified that she cut on one side of Petitioner's body while Dr. Johnson cut on the other side.

Spoilage of evidence was another material ground in dispute. Cedars' expert witness, Amy Rosemann, based her premise for the need for a surgery on a false medical record, and Cedars' motion for summary judgment should have been denied based on the fact that its expert declaration, upon which the entire motion was based, was in dispute.

The Court therefore evaluated the material evidence in dispute and decided which evidence it found to be more credible, which deprived Petitioner of the Seventh Amendment rights and protections under the law. Both

Petitioner and Cedars demanded a jury trial and it was the jury's authority to assess the credibility of witnesses, resolve genuine issues of fact, and make the ultimate determination of whether Cedars and/or Dr. Lineback acted negligently.

Furthermore, when an expert's opinion violates certain imperative laws that protect patients, such as informed consent, that opinion must be discarded.

> If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. **Leg.h.** 1965 ch. 299, operative January 1, 1967.

Evidence Code §623 states:

> Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

Leg.H. 1965 ch. 299, operative January 1, 1967.

The dishonest nature and intent of Cedars' own expert testimony has rendered

Cedars naked and exposed as Respondents defendants without reliable supporting evidence to grant its motion for summary judgment.

Furthermore, when an expert's testimony is proven to be faulty, weak and/or unreliable, as is the case with Cedars' expert Dr. Rosemann's, the entire declaration must viewed with **suspicion, distrust** and dishonesty. Dr. Rosemann makes statements that are not only refuted by the medical records but are violations of law (such as no informed consent disclosure forms).

Finally, Dr. Rosemann's declaration also ignored the fact that Purnell's intestines were damaged to the extent that approximately 12 inches of intestines had to be removed by Dr. Adashek, and more intestines removed and/or rerouted six months later.

A fact of law is that direct testimony and material evidence far outweighs a paid expert's opinion. Furthermore, when expert opinions are contradicted by medical records from impartial doctors and direct testimony from doctors who actually participated in the subject surgery, as in the case at bar, the expert's opinion must be discarded.

Unnecessary Surgeries

This case also challenges the Court's position on unnecessary surgeries for the removal of body parts when the patient is a candidate for less invasive alternatives that are available, and the Court's conclusion that an unnecessary surgery is not *inherently* a violation of law, negligent, violation of a patient's right to life, or below the standard of care in the medical community.

The national importance of clarifying whether or not an unnecessary surgery is a violation of law affects patients and society at large. When unnecessary surgeries are performed, there is not only an inhumane faction to be considered concerning the violation to the human body and a person's Constitutional rights to life but such acts also cause an economic strain on the insurance companies that pay for such surgeries which cause an inevitable economic ripple effect of higher insurance premiums for everyone.

On appeal, Petitioner repeatedly presented two significant cases in her Opening Brief, Reply Brief and oral argument in support of her position that the prescription and performance of an unnecessary surgery is inherently negligent and unlawful in that it has subjected a patient to needlessly go under the knife whether the expert witness opines on his or her conclusion of law or not. First, is the recent case of *Tortorella v. Dan Joshua Castro* (2006)

140 Cal.App.4th 1; 43 Cal.Rptr. 3d 853, which specifically stated that, "an *unnecessary surgery is inherently injurious* in that a patient *needlessly has gone under a knife* and has been subjected to pain and suffering" [emphasis added]; and the second is, *Emerson v. Brentwood* (2001) 146 N.H. 251 [769 A.2d 403]. In *Emerson,* the plaintiff also underwent a hysterectomy surgery that was deemed unnecessary for the same or similar reason(s) as set forth herein; i.e., that "far less invasive and risky ways existed than the removal of the plaintiff's organs."

The Court of Appeal completely disregarded the *Tortorella* case on the grounds that *Tortorella's* expert opined on the standard of care, despite the clear and convincing language of "inherently injurious" and "needlessly gone under the a knife." The Court of Appeal therefore determined that an unnecessary surgery that was "inherently injurious" was not necessarily a violation of law.

However, despite the Court of Appeal's opinion on the legal status of acts that are injurious, violations to the human body *and* criminal violations from an insurance standpoint, the Court of Appeal *refused* to address Petitioner's repeated references to the *Emerson v. Brentwood, supra,* case because it case was *exactly* on point with the case at bar.

In *Emerson,* that plaintiff also underwent a hysterectomy surgery that Emerson's expert deemed was unnecessary for some of the same

reasons set forth herein; i.e., that "far less invasive and risky ways existed than the removal of the plaintiff's organs." In *Emerson,* the lower court dismissed the entire lawsuit on the same basis as this Petitioner's case was dismissed; i.e., that the expert witness did not opine on the standard of care, even though he stated that the hysterectomy surgery was not necessary.

Emerson appealed the lower court's decision to dismiss the entire action because the expert did not opine on the standard of care, and brought the matter before the State Supreme court which overturned the lower courts' findings and remanded the case to trial where Emerson received a victorious jury verdict. Petitioner addressed the Court of Appeal's disregard for this case in her Request for Rehearing but the request was denied without modification.

The Court of Appeal ignored Petitioner's repeated reference to *Emerson* in her Opening Brief, Reply Brief and oral arguments which deprived this Petitioner of the Legislative intent that a case to be viewed in the light most favorable to opposing party, and for a case to proceed to trial when there is *one* triable issue of law in dispute for a jury to decide. In this case, there were multiple deposition testimonies, falsified medical records which Cedars' expert relied on in her declaration, an expert declaration describing the removal of body parts that did not need to be removed, in addition to declaring that this particular surgery was

exceptionally dangerous, and there were no informed consent warnings in the file disclosing the dangers of a hysterectomy and alternative methods of treatments.

Informed Consent

The Court of Appeal determined that a hospital could lawfully satisfy its informed consent obligations under the law (which include notifying a patient that student doctor(s) were *scheduled* to practice surgery on said patient during a pre-planned, non-emergency surgery, of complications of the surgery, of alternative treatments and the dangers of the prescribed treatment), by having the patient sign the stack of pre-admissions forms [allegedly for the private doctor that the patient hired with a separate contract to be able to utilize the hospital premises for the surgery] literally minutes before the surgery was to commence because somewhere in that stack of forms is a disclaimer that says that the hospital is a teaching hospital that ***may*** utilize student doctors. The fact that the student doctor, who knew of the surgery in advance, did not have his or her name placed in the blank next to the name of the specialist that Petitioner hired to perform the surgery was of no consequence to the Court of Appeal.

One fact is undisputed by the record, Cedars and Dr. Johnson willfully, deliberately and boastfully, deceived Petitioner *and the courts* by denying the existence and participation

of a student surgeon which participated in the subject surgery that went terribly wrong, and they perpetuated this falsehood for almost a year in pleadings and arguments alike. This is evidence that the position that their expert witness took in claiming that Cedars had no duty to inform this Petitioner of anything was genuine and was the official position of Cedars and its former chief of staff, Dr. Arthur Johnson.

Furthermore, they had their expert clarify Cedars' position that they owed Petitioner no obligations to inform her of anything; and the Court of Appeal agreed and found no harm or wrongdoing in their actions.

Evidence Code Chapter 5, §413 entitled **Failure to Explain or Deny Evidence – Suppression of Evidence** states:

> In determining what inferences to draw from the evidence of facts in the case against a party, the trier of fact may consider, among other things, the **party's failure to explain or to deny by his testimony** such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case. Leg.H. 1965 ch. 299, operative January 1, 1967.

California Code of Civil Procedure §32:8 reads:

> As an integral part of the physician's overall obligation to the patient, the physician has a duty to make a reasonable disclosure of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each choice. *Cobbs v. Grant* (1972) 8 Cal.3d 229, 104 Cal.Rptr. 443.
>
> The failure of a physician to make reasonable disclosures to ensure that a patient's consent to a particular treatment is informed **creates a cause of action based on informed consent, a subcategory of professional negligence.** [Emphasis] *Townsend v. Turk* (1990, 4th Dist.) 218 Cal.App.3d 278, 266 Cal.Rptr. 821]
>
> The reasonableness of a physician's disclosure is not measured simply by determining the custom of other physicians practicing in the community. Instead, a patient must be given **adequate information to enable him or her to make an intelligent choice,** and thus the scope of the physician's communications to the patient must be measured by the amount of

> information a patient needs in order to make an informed choice. The physician must supply all information material to the patient's decision. [Emphasis]

Cobbs v. Grant (1972)

The Medical Practice Act, Bus. & Professions Code §§2001.1-2262 (Appendix D) clarifies that medical providers have certain obligations and duties under the law which are not optional or transferable.

REASONS FOR GRANTING THE WRIT

1. There are conflicting cases amongst the appellate courts that differ greatly in responsibility.

2. The Court of Appeal's opinion was wrong.

3. The Court's disposal of an entire lawsuit without any supportive dismissal paperwork would increase judicial powers to enable the courts to randomly dispose of cases without any supportive documentation or due process of law and thereby eliminate due process and jury trial protections under the U.S. Constitution.

4. The Court of Appeal's ruling evidences a clear pattern of the elimination of

patient rights and protections as it shifts the value of medical care from the individual's needs and desire for informed, quality medical treatment, to the medical providers' economic advancement, which, in this case, included prescribing and conducting unnecessary surgeries on live human bodies for medical training purposes without that patient's express knowledge or consent.

5. The ramifications of unnecessary surgeries alone impacts our entire economy, as the legalization thereof not only causes pain, suffering and the destruction of human life but also causes enormous unnecessary insurance bills to pay for surgeries and the removal of body parts that did not need to be removed. Medical providers must know that our governing powers value the right to life and will utilize the Seventh and Fourteenth Amendments to protect it.

6. Our informed consent rights and protections under the law must be honored. While it is understandable that medical students must train on live human bodies at some time in their careers, the permission must be given, not taken, for when it is taken without permission or consent, we have compromised the value of our lives to become prey to those whom we have entrusted with our medical care.

This case will potentially affect the conduct of medical providers and patients nationwide.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the opinion of the Court of Appeal of California.

Respectfully submitted,

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03/31/08 • 05/24/08

Appendix A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

No. B188780

DEBORAH A. PURNELL,

Plaintiff and Appellant,

v.

CEDARS-SINAI MEDICAL CENTER et al.

Defendants and Respondents.

(Filed October 10, 2007)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Stern, Judge. Affirmed.

Deborah A. Purnell, in pro. per., for Plaintiff and Appellant.

LaFollette, Johnson, DeHaas, Fesler & Ames, Louis H. DeHaas, Gillian N. Pluma, David J. Ozeran for Defendants and Respondents.

INTRODUCTION

This appeal of a medical malpractice case involves the requirement that an expert witness establish that a healthcare provider's recommendation or rendering of medical care fell below the standard of care. It also involves the validity of the patient's informed consent when there is a signed consent form. Finally, it addresses which persons or entities have a duty to obtain the patient's informed consent. We find that respondent Cedars-Sinai Medical Center (Cedars) was entitled to summary adjudication as to all causes of action and that there was no prejudicial error in granting summary judgment as to respondent Frances Lineback, M.D. (Dr. Lineback).

FACTS

1. Presurgery Medical History

At the time of surgery, appellant was a 46-year-old woman who had undergone two ectopic pregnancies more than 18 years prior. For over a year, appellant experienced irregular menses with heavier than normal bleeding, which became constant during the final three months before surgery. Bruce McLucas, M.D., diagnosed appellant with fibroid tumors three months prior to surgery. His records show he explained the risks and benefits of undergoing a hysterectomy, and appellant elected not to undergo the procedure at that time. Arthur Johnson, M.D.

(Dr. Johnson), later counseled appellant in the outpatient department of Cedars, where she elected to undergo the hysterectomy. At that time, Dr. Johnson was an independent physician with privileges to utilize the hospital facilities.

2. Surgery

Appellant was admitted to Cedars on May 6, 2003, where she signed a surgery consent form recognizing that training physicians and nurses may take part in her surgery. Dr. Johnson, assisted by resident Dr. Lineback, performed a total abdominal hysterectomy on appellant. The surgery was complicated because the doctors had to break up extensive abdominal adhesions and remove a large fibroid before the actual hysterectomy could be performed. The doctors did not close the inner abdominal wall at the conclusion of surgery.

Dr. Lineback assisted in surgery primarily by holding and suturing but stated she probably did perform a portion of the hysterectomy. Approximately eight months after the surgery, Dr. Johnson took an early retirement after being diagnosed with primary progressive aphasia, a disease which slowed his motor skills and made him incapable of performing surgery.

3. Postsurgery Complications

Appellant experienced postoperative bowel obstruction due to the combination of adhesions resulting from the surgery and preexisting

adhesions which may have reformed during surgery. Surgeon Kenneth Adashek, M.D., consulted appellant a week after her surgery. As a result of the blockage, appellant began to vomit, which necessitated the pumping of appellant's stomach from the time of consultation until Dr. Adashek performed corrective surgery seven days later. Dr. Adashek initially attempted to correct the bowel obstruction using nonsurgical decompression, but he eventually had to perform two surgeries, removing approximately 12 inches of appellant's intestine, which had been cut off from a blood supply, to correct the obstruction. There was no evidence the intestine had been cut during the hysterectomy.

PROCEDURE HISTORY

1. Complaint

Appellant, in propria persona, filed a complaint in Los Angeles Superior Court on August 6, 2004, against Dr. Johnson as an individual and corporation, Cedars, and unknown employees of Cedars. The complaint alleged medical negligence, professional negligence, lack of informed consent, contributory negligence, and fraud. Appellant sought compensatory damages, exemplary damages, and punitive damages. The proceedings against Dr. Johnson as an individual and corporation were stayed as the parties entered into binding arbitration. Neither is a party to this appeal.

Cedars demurred on the grounds that causes of action for lack of informed consent, contributory negligence, and fraud failed to state a cause of action, and the causes of action for compensatory and exemplary damages failed to state sufficient facts to constitute a cause of action. Cedars also made a motion to strike the portions of appellant's complaint relating to punitive and exemplary damages and attorney fees on the grounds that they violated Code of Civil Procedure sections 425.13 and 1021. The court sustained the demurrer and motion to strike but granted appellant leave to amend the complaint within 30 days.

Appellant retained counsel, who submitted the first amended complaint alleging medical malpractice against all original defendants. The amended complaint asserted an *Elam* claim[1] against Cedars for negligence in allowing Dr. Johnson to perform appellant's surgery while he was suffering from a debilitating condition. It also asserted negligence for "failure to properly test and evaluate whether plaintiff was a proper candidate for the prescribed course of medical care and/or surgery, failure to obtain appropriate consent prior to and during the conduction of the prescribed course of medical/nursing care and/or surgery, failure to follow the prescribed course of medical care and/or surgery when appropriate,

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[1] *Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, hereinafter, *Elam*.

failure to correctly administer medications, and failure to diagnose and properly treat plaintiff as her condition warranted."

Appellant dismissed her counsel and substituted herself in propria persona. During discovery, appellant learned that Dr. Lineback was the assisting doctor in her surgery and thus amended the complaint to include Dr. Lineback as a defendant in place of Doe 1.

2. Motion for Summary Judgment

Cedars filed a motion for summary judgment on April 7, 2005, supported by the declarations of Amy Rosenman, M.D. (Dr. Rosenman), that the surgical care and treatment of appellant was appropriate and not the proximate cause of her injuries, and Linda Leon, R.N. (Nurse Leon), that the nursing care and treatment was appropriate.

In her declaration, Dr. Rosenman asserted the recommendation of the hysterectomy was within the standard of care, given appellant's abnormal bleeding and the presence of fibroid tumors. She described the procedures involved in conducting a hysterectomy and found that the standard of care was met at all times during appellant's surgery. Dr. Rosenman explained that appellant's injuries were the result of the accepted risks and complications of the procedure and they did not imply negligence. She found there was no evidence that appellant's intestines had been injured during the

hysterectomy. Finally, Dr. Rosenman was of the opinion that Cedars had no duty to inform appellant of the risks of the surgery because it is not the hospital's function to obtain informed consent.

Nurse Leon asserted in her declaration that appellant made no complaints of bruising or soreness in her skin during her stay at the hospital. She further asserted that any potential bruising or scaring from nurse-administered injections were accepted risks and complications of the injections and did not indicate that the injections were performed below the standard of care.

Based on these declarations and appellant's lack of an expert opinion to create an issue of material fact, Cedars moved for summary judgment. Cedars claimed Dr. Rosenman's declaration established that the recommendation, care and treatment were within the standard of care. Cedars asserted that this removed any causation linking Dr. Johnson's medical condition and appellant's injuries necessary to establish negligent medical treatment, which is required for an *Elam* claim. Cedars further asserted that the hospital had no duty to obtain informed consent. Finally, Cedars claimed the declaration of Nurse Leon established the nursing care and treatment were within the standard of care.

3. Opposition and Ruling

The motion for summary judgment was initially scheduled to be heard on June 24, 2005, but appellant was granted three separate continuances to file an opposition. In granting the final continuance, the court clearly told appellant that there would be no further continuances if she failed to produce an expert's opinion regarding the standard of care. The hearing was eventually held on November 9, 2005.

Appellant filed an amended opposition to the summary judgment motion on October 26, 2005, supported by the expert opinion of Simon Henderson, M.D. (Dr. Henderson). The amended opposition alleged that Dr. Johnson negligently recommended appellant undergo the surgery, that Cedars should not have allowed Dr. Johnson to perform surgery in Dr. Johnson's condition or allowed Dr. Lineback to assist, that Dr. Rosenman based her opinions on flawed information, and that appellant did not give informed consent to the hysterectomy or to having Dr. Lineback assist in the operation.

The amended opposition also included the declaration of appellant's expert Dr. Henderson, stating that he disagreed with and would not have made the recommendation to undergo the hysterectomy, feeling it was not necessary and not worth the risk. Dr. Henderson further declared that he saw no evidence Dr. Johnson

had informed appellant of the potential risks and complications of undergoing a hysterectomy.

Cedars argued in its reply that the declaration of appellant's expert did not create a material issue of fact regarding negligent treatment, that appellant signed a form consenting to Dr. Lineback's involvement in the surgery, that Dr. Lineback had no duty to obtain appellant's informed consent because she was not the recommending physician, and finally that appellant was advised of the risks of the hysterectomy by Dr. McLucas and thus she was adequately informed.

On November 9, 2005, the court ruled that Dr. Henderson's declaration did not address the requisite standard of care and thus there was no triable issue of fact. The court rejected appellant's request for another continuance to amend her expert's declaration and granted the motion for summary judgment as to Cedars. The court also granted summary judgment as to Dr. Lineback, although she was not a named party to the motion.

DISCUSSION

I. Applicable Principles of Appellate Review

We review de novo the trial court's decision to grant summary judgment, and "consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all

[uncontradicted] inferences reasonably deducible from the evidence. . . ." (Code Civ. Proc. § 437c, subd. (c).) We view such evidence and inferences in the light most favorable to the opposing party. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) The defendant moving for summary adjudication on any cause of action need only show that the plaintiff cannot establish one necessary element of the cause of action, then the burden shifts to the plaintiff to show a triable issue of fact with respect to that element of the cause of action. (*Id.* At p. 853.) This burden cannot be met by conclusory or argumentative opposition based on mere conjecture or speculation. (*Joseph E. Di Loreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 161.)

Appellant sets forth a long list of issues, but we may consider only those issues raised by the amended complaint. (*Fireman's Fund Ins. Co. v. City of Turlock* (1985) 170 Cal.App.3d 988, 994.) Further, we are confined to consider only those relevant issues that have been adequately raised and supported in appellant's brief. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 452, 466.) "To the extent defendant perfunctorily asserts other claims, without development and, indeed, without a clear indication that they are intended to be discrete contentions, they are not properly made, and are rejected on that basis." (*People v. Turner* (1994) 8 Cal.4th 137, 214 fn.19.) Thus, we consider the granting of summary adjudication regarding the causes of action for negligent recommendation of the hysterectomy, for negligent care and treatment, for an *Elam*

claim, for negligent supervision, and for failure to obtain informed consent. We also review the trial court's ruling on demurrer in relation to the motion for summary judgment, and the appropriateness of summary judgment as to Dr. Lineback, who was not a named party to the motion.

II. The Effect of the Court's Ruling on Demurrer

Appellant argues that the court's ruling on demurrer shows there might be a triable issue of fact regarding an *Elam* claim and should have precluded granting summary judgment to Cedars. In ruling on demurrer, the court accepts the allegations of the complaint as being true. (*Frank and Freedus v. Allstate Ins. Co.* (1996) 45 Cal.App.4th 461, 475.) In ruling on a motion for summary judgment, the court requires declarations or affidavits to establish a triable issue of material fact, rather than relying on assertions that such evidence exists or on conclusory statements based on speculation or conjecture. (*Ibid).* A higher standard must be met to overcome a motion for summary judgment. For this reason, a ruling that a complaint survives a demurrer in no way precludes a grant of summary judgment regarding the same issue.

III. The Court's Refusal to Grant a Continuance

Appellant did not comply with Code of Civil Procedure section 437c, subdivision (h), requiring that a request for mandatory continuance be made in opposition to the motion for summary judgment or by ex parte application made on or before the opposition is due. Since appellant did not comply with the statute, the court's refusal to grant appellant's oral request for continuance was discretionary and is reviewed under the abuse of discretion standard. (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170.)

In this case, the court had previously granted three continuances, spanning more than four months, to allow appellant time to oppose the motion for summary judgment. In granting the last continuance the court explicitly explained to appellant what was required to overcome summary judgment and that no more continuances would be granted if appellant failed to produce it. The court did not abuse its discretion in refusing to grant a fourth continuance.

IV. Care and Treatment

Expert testimony must establish the appropriate standard of care in a medical malpractice cause of action, except in narrow circumstances where the conduct falls within

common knowledge. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.) This is because the standard of care against which a physician's conduct is measured is beyond the knowledge of an average juror and particularly within the knowledge of an expert. (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606-607.) "'When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence.' (*Hutchinson v. United States* (9th Cir. 1988) 838 F.2d 390, 392, citing *Willard v. Hagemeister* (1981) 121 Cal.App.3d 406, 412.)" (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 985.)

Cedars moved for summary judgment supported by the expert declarations of Dr. Rosenman and Nurse Leon. Dr. Rosenman detailed the surgical procedure and concluded that Cedars's performance met the standard of care at all times. Nurse Leon concluded the nursing care met the standard of care, including the administration of the injections. Appellant failed to provide any conflicting expert testimony that the performance of the surgery or medical care and treatment failed to meet the standard of care. Thus appellant failed to create a triable issue of material fact and Cedars was entitled to summary adjudication as to the medical malpractice cause of action against it for the care and treatment rendered to appellant.

V. Recommendation of the Hysterectomy

Cedars moved for summary judgment supported by Dr. Rosenman's expert declaration. Dr. Rosenman reviewed appellant's medical record and concluded that Dr. Johnson's decision to recommend the hysterectomy was within the standard of care, given appellant's abnormal bleeding and the presence of fibroid tumors. Appellant produced Dr. Henderson's expert testimony concluding that based on appellant's medical record she should not have undergone the hysterectomy until less invasive procedures had been tried. Dr. Henderson stated that he would not have recommended the hysterectomy and did not feel it was necessary at that time, but he did not conclude that Dr. Johnson's recommendation fell below the standard of care. Exhibit D attached to appellant's opening brief consists of an amended declaration by Dr. Henderson that recommending the hysterectomy fell below the standard of care, but this declaration was created subsequent to entry of the judgment and cannot be considered because it was not a part of the trial record.

Appellant relies on *Tortorella v. Castro* (2006) 140 Cal.App.4th 1, to argue that recommending an unnecessary surgery is inherently below the standard of care. *Tortorella* is readily distinguished because that court concluded only that an expert's opinion that a surgery was unnecessary, where the performing surgeon allegedly misdiagnosed the patient's

condition, was sufficient to create a triable issue of fact about causation. (*Id.* at p. 3.) The plaintiff's expert witness in that case stated that the recommendation fell below the standard of care, which was the basis for finding a triable issue of fact concerning a breach of duty. Appellant is still required to produce an expert to create a triable issue of fact regarding any alleged breach of the standard of care.

It is clear that Dr. Rosenman and Dr. Henderson had a difference of opinion about Dr. Johnson's recommendation of a hysterectomy against less invasive alternatives. However, a difference of medical opinion about the appropriate procedure to prescribe, given several alternatives, does not establish that the decision to recommend one constitutes negligence. (*Clemens v. Regents of University of California* (1970) 8 Cal.App.3d 1, 13.) Rather, a viable cause of action for medical negligence requires expert testimony establishing the standard of care. (*Williamson v. Prida* (1999) 75 Cal.App.4th 1417, 1424.) Appellant failed to produce conflicting expert evidence as to whether the recommendation to undergo the hysterectomy fell within or below the standard of care. Thus, Cedars was entitled to summary adjudication as to the medical malpractice cause of action against it for the recommendation of the hysterectomy.

VI. *Elam* Claim

The court in *Elam* held that a hospital could be liable to a patient under the doctrine of corporate negligence for the negligent conduct of independent physicians and surgeons who are not hospital employees but are members of the hospital staff. (*Elam*, *supra*, 132 Cal.App.3d 332, 335.) The hospital's liability stems from its "failure to insure the competence of its medical staff through careful selection and review," creating unreasonable risk of harm to the patient. (*Id.* at p. 341.) To prevail on an *Elam* claim, a plaintiff must show that the hospital was negligent in allowing a physician or surgeon to be a member of its staff. As prerequisite to this, the plaintiff must show that the physician or surgeon himself was negligent in his conduct, otherwise there could be no causation linking the patient's injuries to the hospital's negligent supervision.

As discussed above, appellant has failed to show that Dr. Johnson's recommendation or performance of the hysterectomy fell below the standard of care. As a result, appellant has failed to show any negligent conduct on the part of Dr. Johnson. Thus, appellant cannot prevail on an *Elam* claim. Regardless of whether the hospital was negligent in allowing Dr. Johnson to remain on its staff, he performed the surgery within the standard of care and thus there is no causal link between who performed the surgery and any resulting complications. Accordingly,

Cedars was entitled to summary adjudication as to the *Elam* cause of action against it.

VII. Informed Consent

A. Validity of Appellant's Consent to Dr. Lineback's Participation in Surgery

Appellant contends she never consented to and in fact was never made aware that Dr. Lineback would be assisting in performing her surgery. She claims she would never have consented to allowing a resident to do so. However, appellant completely fails to address the consent form she signed upon admittance to the hospital, acknowledging that Cedars was a teaching hospital and that "physicians . . . in training may participate in the operation . . . specified above under the supervising physician or surgeon named above" and consenting thereto.

Appellant relies on *Quintanilla v. Dunkelman* (2005) 133 Cal.App.4th 95, to argue that the validity of a written consent form signed by the patient is a question of fact for the jury and thus summary judgment is improper. The court there concluded, "The law is clear in California that the existence of informed consent is an issue of fact for the jury" and that "the adequacy of a written consent is a factual issue for the jury, and does not stand for the proposition that a signed form is conclusive proof that informed consent was given." (*Id.* at pp. 115-116.) However, in that case there was

significant conflicting evidence that the consent form was written in Spanish, which the plaintiff contended she did not understand, and the performing surgeon, who she had never met, went outside the scope of the procedures authorized by the consent form. (*Id.* at pp. 117-118.) In this case, appellant presents no conflicting evidence except her own assertion that she did not consent to Dr. Lineback's participation, with no reference or explanation as to why her signed consent was invalid.

More importantly, the court in *Quintanilla* addressed the validity of the informed consent to medical procedures, an issue particularly well suited to a jury because the duty of disclosure of the risks and complications of the procedure is not governed by the community standard of care but by law that governs the physician's conduct in the same way as for any other fiduciary relationship. (*Berkey v. Anderson* (1969) 1 Cal.App.3d 790, 805.) It is a peculiarly fact-based question as to the breadth and depth to which a physician should explain the risks and complications of a procedure that is particular to the individual patient. *(Ibid.)*

This is an entirely different issue than the type of consent appellant is contesting in this case. Here, we are assessing the validity of a signed, written consent to the participation of training physicians and nurses in surgery performed on a nonemergency basis. None of the same particularities to each individual patient are present. The ability of a hospital to rely on a

written consent form to allow physicians and nurses in training to participate in surgery under the supervision of senior physicians and surgeons is a crucial element in the proper training of physicians and nurses.

Nonemergency consent to participation in surgery is better addressed as courts have addressed physician-patient arbitration agreements, where a patient will be bound by his signed consent in the absence of evidence that he did not understand what he was signing or that he signed the form to receive urgent medical care. (See *Bolanos v. Khalatian* (1991) 231 Cal.App.3d 1586, 1590-1591; *Coon v. Nicola* (1993) 17 Cal.App.4th 1225, 1238.) Appellant signed the form consenting to Dr. Lineback's participation in the surgery as a physician in training. She signed the form under a nonemergency basis and presented no evidence that she did not understand the form. She was bound by her written consent, and Cedars was entitled to summary adjudication as to the cause of action for failure to obtain consent to Dr. Lineback's participation in surgery.

B. *Dr. Lineback's Duty to Obtain Informed Consent*

Appellant contends Dr. Lineback had an independent duty to obtain informed consent based on her participation in the surgery. The seminal case on the doctrine of informed consent in California is *Cobbs v. Grant* (1972) 8 Cal.3d 229, which established that the treating

physician had a duty of reasonable disclosure of the available choices for treatment and the risks and complications associated with each. (*Id.* at p. 243.) In explaining the reasoning for such a duty, the court explained that "[a] medical doctor, being the expert, appreciates the risks inherent in the procedure he is prescribing, the risks of a decision not to undergo the treatment, and the probability of successful outcome of the treatment." (*Ibid.*) The court emphasized that the duty to disclose fell on the prescribing physician, at which point the choice as to the course of action fell exclusively on the patient. (*Ibid.*) The duty is derived from the being in the position to prescribe the treatment.

In *Quintanilla v. Dunkelman, supra,* 133 Cal.App.4th 95, the court expanded this duty to include both the referring physician and the treating and performing surgeon, where the patient had never met the surgeon and reasonably believed the referring physician would be performing the surgery. (*Id.* at pp. 118-119.) The court in *Wilson v. Merritt* (2006) 142 Cal.App.4th 1125, concluded that the duty fell on the original prescribing physician and the performing physical therapist, where the physician administered the anesthesia and the patient reasonably believed the physician would be in charge throughout the procedure. (*Id.* at pp. 1136-1137.) Importantly, the duty to obtain informed consent rests only with those physicians who have actively managed the patient's care. (*Id.* at p. 1134.)

No case has imposed a duty on assisting surgeons to obtain informed consent from the patient. An assisting surgeon is not in the same position to inform the patient of relevant information at the time of prescribing the treatment. An assisting surgeon is generally not actively involved in managing the patient's care. Rather, an assisting surgeon is generally a member of the hospital staff who works under the supervision of the performing surgeon as needed, with little or no prior contact with the patient to establish a physician-patient relationship. There is no public policy furthered by requiring each hospital employee assisting in the care for a patient to obtain informed consent. This is especially true in this case, where the assisting surgeon is a resident in training. The duty to obtain informed consent should remain with the prescribing and treating physician. As such, Dr. Johnson had the duty to obtain appellant's informed consent as the physician who prescribed and performed the surgery. Dr. Lineback had no such duty as a resident, assisting primarily in holding in suturing.

C. *Duty of Cedars to Obtain Informed Consent*

Appellant contends Cedars had a duty to obtain her informed consent to the hysterectomy because it was performed at the hospital. California courts have yet to specifically address the issue. As discussed earlier, it is clear that the court in *Cobbs v. Grant, supra*, 8 Cal.3d 229, was focusing on the duty of the treating

physician to disseminate relevant information to the patient and to gain her informed consent prior to conducting the surgery. (*Id.* at p. 243.) This duty was based on the fiduciary relationship the treating doctor shared with the patient and the disparity in medical knowledge between the doctor and patient. (*Ibid.*) A hospital does not share this same fiduciary relationship with the patient. Further, hospital staff members do not necessarily have the same level of expert knowledge regarding the factors to be considered in choosing to undergo treatment, nor are they in the position at the time of prescribing treatment to disseminate the information.

In *Derrick v. Ontario Community Hospital* (1975) 47 Cal.App.3d 145, the court recognized that placing a duty on the hospital could disrupt the relationship between the treating physician and the patient. (*Id.* at p. 154.) The court in that case was considering whether the hospital had a duty to inform the patient or her parent that she had a contagious disease. The court found the duty fell exclusively with the treating physician, explaining its reasoning: "We do not think it wise to impose upon Hospital the duty to advise a patient or a patient's parents concerning the patient's condition when that duty might substantially interfere with the relationship between the patient and her attending physician. (*Ibid.*) The impact on the physician-patient relationship is likely to be even more drastic if a duty to obtain informed consent to treatment were imposed on the hospital. It

could disrupt the physician's ability to recommend and render the treatment which the physician feels is best suited to the situation.

While it is not the case for general surgical procedures, the California Legislature has specifically addressed the issue of consent to performing a hysterectomy. Health and Safety Code section 1690 lays out the specific information which must be given to the patient both orally and in writing before undergoing surgery. The statute requires that, "Prior to the performance of a hysterectomy, physicians and surgeons shall obtain verbal and written informed consent." (Health & Saf. Code, § 1690, subd.(a).) This suggests the Legislature considered the issue and did not find it necessary to impose a duty to obtain informed consent on the hospital in the same way as it did for physicians and surgeons.

Other states have addressed the issue. The almost universal consensus had been that, where an independent, nonemployee physician or surgeon performs a surgery utilizing the hospitals facilities, it is the duty of the physician or surgeon alone to obtain the patient's informed consent and no such duty rests with the hospital. (See, e.g., *Krane v. Saint Anthony Hosp. Systems* (Colo.App. 1987) 738 P.2d 75; *Petriello v. Kalman* (D.Conn. 1990) 576 A.2d 474; *Auler v. Van Natta* (Ind.App. 1997) 686 N.E.2d 172; *Giese v. Stice* (Neb. 1997) 567 N.W.2d 156; *Fiorentino v. Wenger* (N.Y.App. 1967) 227 N.E.2d 296; *Kershaw v. Reichert* (N.D. 1989) 445

N.W.2d 16; *Goss v. Oklahoma Blood Institute* (Okla.App. 1990) 856 P.2d 998; *Boney v. Mother Frances Hosp.* (Tex.App.-Tyler 1994) 880 S.W.2d 140.) These other jurisdictions have recognized that imposing such a duty, as urged by appellant would detrimentally interfere with the physician-patient relationship.

We decline to impose on the hospital a duty to obtain an additional informed consent from the patient as to surgery performed by a nonemployee physician or surgeon utilizing the hospital's facilities. In this case, Dr. Johnson prescribed the hysterectomy as an independent physician and then utilized his staff privileges to perform the surgery at the hospital. Dr. Johnson had a duty to obtain appellant's informed consent, but Cedars had no such duty. Cedars was entitled to summary adjudication as to the cause of action for failure to obtain appellant's informed consent to the hysterectomy.

VIII. Summary Judgment in Favor of Dr. Lineback

While Cedars's motion for summary judgment was pending, appellant learned that Dr. Lineback had assisted in her surgery and added her in an amendment to her complaint. Thus Dr. Lineback was not a named party in the motion for summary judgment. Nevertheless, the court granted summary judgment with respect to both respondents.

Appellant contends that this constituted procedural error. Assuming, arguendo, there was procedural error, this alone does not warrant a reversal. Pursuant to Code of Civil Procedure section 475, no judgment should be reversed due to error unless it appears from the record that the error was prejudicial and that a different result would have been likely if the error had not occurred.

Here, it is readily apparent that a different outcome would not have resulted even if Dr. Lineback had filed her own separate motion for summary judgment. Indeed a summary of the procedural circumstances indicates why Dr. Lineback came to be in the unusual situation of joining a codefendant's pending motion.

Appellant filed her complaint against Cedars on August 6, 2004. In January 2005, she filed her first amended complaint. Dr. Lineback was not named as a defendant in either pleading. In April 2005, Cedars moved for summary judgment, and a hearing was scheduled for June 24, 2005. While Cedars's motion for summary judgment was pending, Dr. Lineback was added on June 15, 2005, as a Doe defendant. Shortly thereafter, on July 29, 2005, appellant filed her original opposition to Cedars's motion for summary judgment. Then, at appellant's request, the motion was continued multiple times to allow her time to submit an amended opposition with a supporting expert

declaration. Her amended opposition was filed on October 26, 2005.

Cedars and Dr. Lineback filed a reply brief. This appears to be the first time that Dr. Lineback was mentioned as a moving party in connection with Cedars's motion for summary judgment. At the hearing on November 9, 2005, Cedars's counsel stated: "Since filing of the motion for summary judgment, [appellant] amended the complaint to add Dr. Lineback, who's a resident at Cedars whose only role was assisting in the surgery. [¶] The motion for summary judgment addressed that the surgery complied with the standard of care. . . . Does this motion apply to her"? The trial court concluded that it did, and ordered Cedars's counsel to prepare an order reflecting its ruling that it was granting summary judgment to Cedars and Dr. Lineback.

Thus, the trial court treated the reply brief as if it were a proper vehicle for Dr. Lineback to formally join Cedars's summary judgment motion. Dr. Lineback's "motion" for summary judgment does not comply with the statutory requirements. Dr. Lineback did not file any appropriate moving papers, such as a separate statement. (Code of Civil Proc., § 437c, subd. (b); *Village Nurseries v. Greenbaum* (2002) 101 Cal.App.4th 26, 46-47.) Given that she was first mentioned as a "moving party" in the reply brief, she also did not provide adequate statutory notice that she intended to "join" in Cedars's motion. (See, e.g., *Urshan v. Musicians' Credit*

Union (2004) 120 Cal.App.4th 758, 765.) The issue then is whether these failures constitute reversible error.

We conclude that the order granting summary judgment to Dr. Lineback should be affirmed. A judgment may be set aside if, after an examination of the whole record, the court is convinced that an error has resulted in a miscarriage of justice, was prejudicial, and that a different result would be probable if no error had occurred. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 802.) Appellant cannot establish these elements. Other than claiming that her right to notice was violated, she demonstrates no prejudice. She offers no argument or evidence that would compel denial of Dr. Lineback's motion for summary judgment.

In the same vein, appellant does not demonstrate that a different result would have been probable had the error not occurred. As we noted above, appellant's claims against Dr. Lineback are limited by her pleadings, which limit her claims to medical malpractice in the performance of the surgery and in the failure to obtain informed consent. As set forth in the trial court's order granting the motion for summary judgment, there is no evidence that Cedars or its physicians did anything wrong. It follows that appellant has no claim against Dr. Lineback, who merely assisted in the procedure.

In fact, collateral estoppel would bar appellant's claims. "The doctrine of collateral estoppel precludes relitigation of an issue previously adjudicated if: (1) the issue necessarily decided in the previous suit is identical to the issue sought to be relitigated; (2) there was a final judgment on the merits of the previous suit; and (3) the party against whom the plea is asserted was a party, or in privity with a party, to the previous suit." (*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 910.) Summary judgment in favor of Cedars is a final judgment on the merits establishing that the standard of care was met at all times during appellant's surgery, without regard to the specific acts of Dr. Johnson or Dr. Lineback. Thus, appellant is collaterally estopped from relitigating this issue, and Dr. Lineback would prevail as a matter of law on any claim for medical malpractice relating to the hysterectomy.

Moreover, Dr. Lineback had no duty to obtain appellant's informed consent because she was merely a resident assisting in the surgery.

It follows that the procedural errors committed in connection with the trial court's order granting summary judgment to Dr. Lineback do not amount to reversible error.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

s/ BOREN, P.J.
BOREN, P.J.

We concur:

s/ DOI TODD, J.
DOI TODD, J.

s/ ASHMANN-GERST, J.
ASHMANN-GERST, J.

Appendix B

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 2

November 05, 2007

Deborah Purnell
19503 Scobey Avenue
Carson, CA 90746

Deborah Purnell
v.
Arthur I. Johnson, et al.

B188780
Los Angeles County No. BC319741

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

Appendix C

Court of Appeal, Second Appellate District,

Div. 2 – No. B188780

S158361

IN THE SUPREME COURT OF CALIFORNIA

En Banc

DEBORAH A. PURNELL,

Plaintiff and Appellant,

v.

CEDARS-SINAI MEDICAL CENTER et al.,

Defendants and Respondents.

(Filed Jan. 3, 2008)

The petition for review is denied.

Werdegar, J., was absent and did not participate.

GEORGE

Chief Justice

Appendix D

The Medical Practice Act, Bus. & Prof. Code §§2001.1-2262 are set forth in pertinent part as follows:

Section 2001.1: Protection of the public shall be the highest priority for the Medical Board of California in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

Section 2234: The Division of Medical Quality shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter.

(b) Gross negligence.

(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the

applicable standard of care shall constitute repeated negligent acts.

(1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.

(2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care.

(d) Incompetence.

(e) The commission of any act involving dishonesty or corruption which is substantially related to the qualifications, functions, or duties of a physician and surgeon.

Section 2234.1:

(a) A physician and surgeon shall not be subject to discipline pursuant to subdivision (b), (c), or (d) of Section 2234 solely on the basis that the treatment or advice he or she rendered to a patient is alternative or complementary medicine, including the treatment of persistent Lyme Disease, if that treatment or advice meets all of the following requirements:

(1) It is provided after informed consent and a good-faith prior examination of the patient, and medical indication exists for the treatment or advice, or it is provided for health or well-being.

(2) It is provided after the physician and surgeon has govern the patient information concerning conventional treatment and describing the education, experience, and credentials of the physician and surgeon related to the alternative or complementary medicine that he or she practices.

(3) In the case of alternative or complementary medicine, it does not cause a delay in, or

discourage traditional diagnosis of, a condition of the patient;

(4) It does not cause death or serious bodily injury to the patient.

(b) For purposes of this section, "alternative or complementary medicine," means those health care methods of diagnosis, treatment, or healing that are not generally used but that provide a reasonable potential for therapeutic gain in a patient's medical condition that is not outweighed by the risk of the health care method.

(c) Since the National Institute of Medicine has reported that it can take up to 17 weeks for a new best practice to reach the average physician or surgeon, it is prudent to give attention to new developments not only in general medical care but in the actual treatment of specific diseases, particularly those that are not yet broadly recognized in California.

Section 2261. Knowingly making or signing any certificate or other document directly or indirectly related

to the practice of medicine or podiatry which falsely represents the existence or nonexistence of a state of facts, constitutes unprofessional conduct.

Section 2262. Altering or modifying the medical record of any person, with fraudulent intent, or creating any false medical record, with fraudulent intent, constitutes unprofessional conduct.

In add to any other disciplinary action, the Division of Medical Quality or the California Board of Podiatric Medicine may impose a civil penalty of five hundred dollars ($500) for a violation of this section.

Section 2263. The willful, unauthorized violation of professional confidence constitutes unprofessional conduct.

Section 2266. The failure of a physician and surgeon to maintain adequate and accurate records relating to the provision of services to their patients constitutes unprofessional conduct.